

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

**Craftwood Lumber Company's Comments on Petition for Waiver of the
Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by
Senco Brands, Inc.**

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Executive Summary

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) to defendants in private TCPA litigation and allowed “similarly situated” persons to seek waivers (“Opt-Out Order”). The Commission ruled that “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests.” The Commission specifically refused to grant blanket future waivers.

The Commission should deny the petition for waiver brought by Senco Brands, Inc. (“SBI”) for each of the following reasons:

First, the Commission has no authority to “waive” violations of any regulations “prescribed under” the TCPA in a private right of action.¹ Doing so would violate the separation of powers by dictating a “rule of decision” to the courts, which have exclusive power to determine whether a violation of the regulations has taken place, and by abrogating Congress’s determination that “each such violation” automatically gives rise to \$500 in minimum statutory damages.²

Second, SBI is not “similarly situated” to the petitioners to whom waivers were granted in the Opt-Out Order, in at least three respects: (1) SBI does not, and cannot, maintain that it sent fax ads to Craftwood Lumber Company (“Craftwood”) or any other

¹ *Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (holding federal agency lacked authority to create affirmative defense to its own regulations in statutory private right of action).

² *United States v. Klein*, 80 U.S. 128, 147–48 (1872); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630 at *14 (W.D. Mich. Dec. 12, 2014).

recipient with their prior express permission; (2) SBI gives no reason for its failure to provide opt-out notices on its fax ads; and (3) the two reasons SBI gives that “good cause” exists for its waiver are directly refuted by the Opt-Out Order.

Third, SBI alleges that Craftwood “voluntarily provided its fax number to [SBI], and has an established business relationship with [SBI].” As recognized by the Commission in the Opt-Out Order, no waiver is to be granted in connection with “fax ads sent pursuant to an established business relationship.” Accordingly, SBI was obligated to provide an opt-out notice on fax ads sent to Craftwood (or any other class member with whom SBI claims to have an established business relationship). But SBI does not claim that there were any opt-out notices on any of its fax ads.

It would be against public interest to waive SBI’s liability under § 64.1200(a)(4)(iv) in connection with its failure to provide opt-out notices on any faxes sent to Craftwood (or to anyone else on the basis of an established business relationship) just because some of the recipients of such faxes may have given SBI prior express permission. SBI cannot claim any confusion or misplaced confidence about the need to provide an opt-out notice on such fax ads in the first place because of established business relationships with recipients.

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Commenter Craftwood Lumber Company ("Craftwood") is the named plaintiff and proposed class representative in a private TCPA action pending in the United States District Court for the Northern District of Illinois against petitioner Senco Brands, Inc. ("SBI").³ SBI seeks a "retroactive waiver" of § 64.1200(a)(4)(iv) requiring opt-out notices on fax advertisements sent with "prior express invitation or permission," which, if obtained, it intends to present to the district court, asking it to dismiss any claims based on violations of the regulation.⁴ On December 30, 2014, the Consumer and Governmental Affairs Bureau sought comments on SBI's petition by January 13, 2015.⁵

³ Case No. 1:14-cv-06866.

⁴ See *Petition of Senco Brands, Inc. for Waiver*, CG Docket No. 05-338 (filed Dec. 11, 2014).

⁵ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions For Waiver of the Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Dec. 30, 2014).

The Commission's October 30 "Opt-Out Order"

On October 30, 2014, the Commission issued the "Opt-Out Order,"⁶ granting "retroactive waivers" intended to relieve the covered TCPA defendants of liability in private TCPA actions for past violations of § 64.1200(a)(4)(iv), as well as prospective waivers for any future violations through April 30, 2015.⁷ The Opt-Out Order allowed "similarly situated" parties to petition for similar waivers.⁸ The Commission ruled that "all future waiver requests will be adjudicated on a case-by-case basis" and did not "prejudge the outcome of future waiver requests."⁹ The Commission specifically refused to grant blanket future waivers.¹⁰

Before it addressed waivers in the Opt-Out Order, the Commission ruled that its adoption of § 64.1200(a)(4)(iv) was a valid exercise by the Commission of Congressional authority granted under 47 U.S.C. § 227(b).¹¹ Further, the Commission found that

⁶ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014).

⁷ Craftwood contends that under no circumstances should the Commission grant any waiver to SBI for fax ads sent after October 30, 2014.

⁸ *E.g.*, Opt-Out Order ¶ 5.

⁹ *Id.* ¶ 30, n. 102.

¹⁰ *Id.* ¶ 13.

¹¹ Opt-Out Order ¶ 14. Unless as expressly noted, all statutory references herein to "§ 227" are to 47 U.S.C. § 227 and all Commission references herein to "§ 64.1200" are to 47 C.F.R. § 64.1200.

requiring an opt-out notice on fax ads sent to recipients who give prior express permission serves highly useful and important purposes: “absent [such] a requirement...recipients could be confronted with a practical inability to make senders aware that their consent is revoked. At best, this could require such consumers to take, potentially, considerable time and effort to determine how to properly opt out...At worse, it would effectively lock in their consent. Moreover...giving consumers a cost-free, simple way to withdraw previous consent is good policy.”¹²

The Commission also ruled that the “similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship” was completely unaffected by the Opt-Out Order and continues to be mandatory.¹³

After making these rulings, the Commission found that “good cause exists to grant a retroactive waiver” to the petitioners covered by the Opt-Out Order, observing that “good cause” is shown if “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”¹⁴ With respect to the petitioners covered by the Opt-Out Order, the Commission found that “special circumstances” existed because of the “confusion” caused by footnote 154 in the Commission’s 2006 Junk Fax Order, 21 FCC Rcd. at

¹² *Id.* ¶ 20.

¹³ Opt-Out Order ¶ 2, n.2, ¶ 28, n.99.

¹⁴ Opt-Out Order ¶¶ 22, 23.

3810.¹⁵ In that regard, the Commission specifically noted that “all petitioners make reference to the confusing footnote language in the record.”¹⁶ The Commission also found that covered petitioners could have had “misplaced confidence” that § 64.1200(a)(4)(iv) did not potentially apply to recipients who had given prior express permission.¹⁷ But the Commission emphasized that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”¹⁸

The Commission also found that “granting a retroactive waiver would serve the public interest, citing the showings made by covered petitioners that they were subject to “potentially substantial damages” for having violated § 64.1200(a)(4)(iv).¹⁹

The Underlying Litigation

I. Craftwood’s Complaint

On September 5, 2014, Craftwood commenced an action in the United States District Court for the Northern District of Illinois against SBI for sending fax ads in direct violation of the TCPA and the Commission’s regulations. Craftwood avers that SBI violated the TCPA in two independent ways: (1) by failing to obtain prior express permission from targeted recipients to send its fax ads; and (2) by failing to include an

¹⁵ *Id.* ¶ 24.

¹⁶ *Id.*

¹⁷ Opt-Out Order ¶¶ 26-27.

¹⁸ *Id.* ¶ 26.

¹⁹ Opt-Out Order ¶ 27, citing, among others, the Best Buy petition at 5 stating that “Best Buy is now facing a putative class action lawsuit, alleging millions of damages, a claim for which it has no insurance coverage and no ability to pay.” *See id.*, ¶ 28, n.98.

opt-out notice, required by statute and the Commission's regulations,²⁰ advising recipients of their right to stop future SBI fax ads and informing them how to make a valid opt-out request.²¹ Craftwood specifically avers that it did not give prior express permission to SBI to send fax ads and did not have an established business relationship with SBI.²²

Craftwood seeks to represent a class of all SBI junk fax recipients commencing within the four years preceding the filing, *i.e.*, since September 5, 2010.²³ Craftwood requests, on behalf of itself and the putative class, statutory damages and an injunction to enjoin future SBI junk faxes.²⁴

Craftwood attaches, as Exhibit 1 to the complaint, a copy of a fax ad sent via facsimile transmission to Craftwood on January 12, 2012. There is no opt-out notice whatsoever contained in Exhibit 1.

²⁰ § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). In other words, SBI's alleged violations of the opt-out notice requirements are not limited to violations of § 64.1200(a)(4)(iv).

²¹ See Declaration of Eric M. Kennedy ("Kennedy Decl."), Ex. A (Craftwood Complaint) ¶¶ 11, 20.

²² *Id.* ¶ 11.

²³ *Id.* at ¶¶ 12-18.

²⁴ *Id.* ¶ 22, Prayer for Relief. In the Prayer for Relief, Craftwood seeks minimum statutory damages of \$1 million and to have such damages increased by three times because SBI's violations were "willful" and/or "knowing."

II. SBI's Amended Answer

SBI alleges in its Amended Answer that Craftwood “voluntarily provided its fax number to Defendant, and has an established business relationship with Defendant.”²⁵

III. SBI obtains a stay of the case based on this petition

Earlier in the case, before the Opt-Out Order was issued, SBI's lawyers informed Craftwood's lawyers that their client intended to seek a stay of this litigation until the Commission ruled on the then-pending petitions. Yet SBI did not bring that motion, and the parties continued with the Rule 26 disclosure process. Immediately following counsel's Rule 26(f) conference, Craftwood served interrogatories, Rule 34 requests for the production of documents, and requests for admission on SBI.²⁶

The Commission ruled on the then-pending petitions and released the Opt-Out Order on October 30. For weeks after the Opt-Out Order SBI did nothing. On December 10, however, over three months into litigation, SBI filed a motion to stay the litigation, but not the one it had earlier announced. SBI moved to stay the case until the Commission rules on its petition for waiver, which it filed on December 11. On

²⁵ See Kennedy Decl., Ex. B (SBI Amended Answer) ¶ 11. While in its third affirmative defense SBI baldly alleges that “Plaintiff provided prior express permission” (Ex. B, p. 17), the mere act of providing a fax number to another does not constitute prior express permission under the TCPA. In order to validly give prior express permission “the recipient must be expressly told that the materials to be sent are advertising materials, and will be sent by fax.” *Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 748 (Ohio C.P. 2003). The Commission stresses that prior express permission “requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14129 ¶ 193, (2003).

²⁶ SBI objected to every single discovery request by Craftwood and refused to provide any discovery regarding any other putative class member.

December 19, the District Court entered an order staying the case until May 18.

Craftwood has therefore already been prejudiced by SBI's petition.

IV. SBI's Petition for Waiver

In its petition, SBI baldly asserts that Craftwood "expressly provided permission to Senco in 2007 to receive fax advertisements."²⁷ But this is an *impossibility* because SBI did not even exist in 2007. SBI wasn't formed until two and a half years later, in June 2009.²⁸

One month later, in July 2009, SBI bought the assets of the bankrupt Senco Products. The bankruptcy court order approving the deal makes clear, however, that SBI was not an affiliate of or successor to Senco Products, and is "not holding itself out to the public as a continuation of the Debtors."²⁹

SBI does not assert in its petition that it, since its creation in June 2009, obtained prior express permission to send fax ads to anyone. The most it contends is that it has an established business relationship with its customers to whom it sent faxes.³⁰

²⁷ Petition at 6.

²⁸ SBI was formed as a Delaware corporation on June 15, 2009, and was authorized to business as a foreign corporation in Ohio on July 9, 2009. (See Kennedy Decl., Exs. C and D.)

²⁹ See Kennedy Decl., Ex. E, ¶ T.

³⁰ Petition at 1. SBI does not actually even have an established business relationship with Craftwood either. SBI contends in its petition that the placing by Craftwood of an order in 2006 somehow created an established business relationship between SBI and Craftwood. See Petition at 6. But that order was not placed with SBI, but with the now-defunct *Senco Products*. As stated above, SBI was not formed until June 2009 and therefore no established business relationship was created between SBI and Craftwood. See also Junk Fax Order, ¶ 20 (established business relationship exemption applies only to the entity with which the business or subscriber has had a "voluntary two-way communication" and does not extend to affiliates of

Footnote continued on next page

SBI offers no explanation whatsoever for its failure to provide an opt-out notice in its fax ads.³¹ It does not claim to have been confused about any of the opt-out notice requirements. Nor does it claim that it had misplaced confidence that any of the opt-out requirements did not apply.³² Accordingly, SBI made no attempt to show that it is

Footnote continued from previous page
that entity).

³¹ Due-process precludes SBI from offering any additional or different facts than those contained in its petition. Craftwood requests that the Commission ignore any additional or different facts that SBI may proffer in its reply.

³² The proceedings following the 2006 Junk Fax Order were not discussed in any of the petitions covered by the Opt-Out Order or any of the comments on those petitions. The record of those proceedings demonstrates that regulated parties immediately understood that the plain language of the 2006 rules required an opt-out notice on faxes sent with permission and that no one was “confused” by footnote 154 or the notice of rulemaking. *See, e.g., In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006), and public comments to this Petition for Reconsideration, including those by the American Society of Association Executives and the Named State Broadcasters Associations; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Society of Association Executives (July 12, 2006); National Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

Likewise, contemporaneous legal observers immediately understood the rule. *See, e.g., FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006) (“The opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient’s prior express invitation or permission.”). The courts also understood the plain language of the rule. *See, e.g., In re Sandusky Wellness Ctr., LLC*, 570 F. App’x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing “plain language” of the rule); *Ira Holtzman, C.P.A., & Assocs., Ltd. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013) (applying plain language of the rule in affirming class certification and summary judgment).

In sum, there is no evidence in the record of anyone in particular ever actually being “confused” by footnote 154 or the notice of rulemaking.

“similarly situated” to the petitioners that received waivers under the Commission’s Opt-Out Order.³³

Instead, SBI gives two reasons (and two reasons only) why “good cause” exists for a waiver. First, it asserts that granting it a waiver would be in the “public interest” because no purpose is served in providing an opt-out notice to anyone who “had given permission to Senco to send a fax advertisement, and importantly, was capable of contacting Senco for purposes of opting out of future fax communications.”³⁴ Second, it asserts that the “denial of the waiver would be inequitable and could impose unfair liability on Senco based on claims that Congress never intended to create.”³⁵

SBI does not state whether it intends to comply with § 64.1200(a)(4)(iv) or any other opt-out notice requirement in the future, or whether it has implemented any procedures to ensure compliance going forward.

³³ SBI asserts that it is “currently facing a putative class action seeking potentially multi-millions of dollars.” Petition at 1. But SBI provides no support for this assertion and further this assertion is belied by Craftwood’s Prayer for Relief, Compl. ¶ 22 (seeking \$1 million in statutory damages to be trebled.) Nor does SBI assert that the judgment sought by Craftwood would be financially ruinous to SBI.

³⁴ Petition at 5.

³⁵ Petition at 6.

Argument

I. The Commission does not have the authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.

A. The Commission has no authority to “waive” its regulations in a private right of action.

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”³⁶ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.³⁷ The “appropriate court” then determines whether “a violation” has taken place.³⁸ If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in statutory damages for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation if it finds the violations were “willful[] or knowing[].”³⁹

The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should

³⁶ § 227(b)(3).

³⁷ § 227(b)(2).

³⁸ § 227(b)(3)(A)–(B).

³⁹ § 227(b)(3).

be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.⁴⁰

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.⁴¹ It does not authorize the Commission to intervene in a private right of action.⁴² It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.⁴³ Nor does it limit a private plaintiff’s right to sue for violations in situations where the Commission declines to prosecute.⁴⁴

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.⁴⁵ Private citizens have no role in that process.⁴⁶ Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce, but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement actions.⁴⁷

⁴⁰ § 227(b)(3).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*; *Cf.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

⁴⁴ *Cf.*, e.g., 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain “right-to-sue” letter from Equal Employment Opportunity Commission).

⁴⁵ *Id.* § 503(b).

⁴⁶ *Id.*

⁴⁷ *Turza*, 728 F.3d at 688 (holding TCPA “authorizes private litigation” and agency enforcement, so consumers “need not depend on the FCC”).

This is not an unusual scheme. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards⁴⁸ that are enforceable both in private “citizen suits”⁴⁹ and in administrative actions.⁵⁰

B. A waiver would violate the separation of powers, both with respect to the judiciary and Congress.

The seminal separation-of-powers case is *United States v. Klein*,⁵¹ involving a statute passed by Congress intended to undermine a series of presidential pardons issued during and after the Civil War to former members of the Confederacy. The statute directed the courts to treat the pardons as conclusive evidence of guilt in proceedings brought by such persons seeking compensation for the confiscation of private property by the government during the war, thereby justifying the seizure of their property.⁵²

The Supreme Court held the statute violated the separation of powers by forcing a “rule of decision” on the judiciary that impermissibly directed findings and results in particular cases.⁵³ The Court held one branch of government cannot “prescribe a rule for

⁴⁸ 42 U.S.C. § 7412(d).

⁴⁹ 42 U.S.C. § 7604(a).

⁵⁰ 42 U.S.C. § 7413(d).

⁵¹ 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

⁵² *Id.*

⁵³ *Id.* at 146.

the decision of a cause in a particular way” to the judicial branch and struck down the law.⁵⁴

But dictating a “rule of decision” is precisely what the “waiver” requested by SBI seeks to accomplish. The goal, as SBI does not hesitate to admit, is to prevent the Northern Illinois District Court from finding “a violation” of § 64.1200(a)(4)(iv). If the waiver is granted, the statute will remain the same. This regulation will remain the same. But the federal district court will be told it cannot find “a violation” of the regulation. That the Commission cannot do.

SBI might argue that the court could still find a violation of the regulation after a waiver; it simply cannot award damages. That does not save its argument because then the “waiver” would abrogate Congress’s directive that when the “appropriate court” finds “a violation,” the private plaintiff is automatically entitled to a minimum of \$500 in statutory damages.⁵⁵ The Commission has no power to “waive” a statute.⁵⁶ From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by SBI, and it should deny SBI’s requested waiver.

⁵⁴ *Id.*

⁵⁵ § 227(b)(3).

⁵⁶ *In re Maricopa Community College Dist. Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements on KJZZ(FM) and KBAQ(FM), Phoenix, Arizona*, FID Nos. 40095 & 40096, Mem. Op. & Order (rel. Nov. 24, 2014) (“The Commission’s power to waive its own Rules cannot confer upon it any authority to ignore a statute. While some portions of the Act contain specific language authorizing the Commission to waive provisions thereof, the Act grants no such authority with respect to Section 399B.23.”).

Indeed, the United States District Court for the Western District of Michigan, in a private TCPA action wherein the defendant sought a waiver, just last month held “[i]t would a fundamental violation of the separation of powers for [the Commission] to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”⁵⁷ The court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether the defendant violated the “regulation prescribed under” the TCPA.⁵⁸ The court concluded that “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”⁵⁹

Accordingly, the Commission should decline to issue a “waiver” to shield SBI from private TCPA liability (as opposed to Commission enforcement). If the Commission decides to grant SBI a “waiver,” it should expressly state that its effect is limited to Commission enforcement proceedings.

The decision in *Stryker* is fully supported by the D.C. Circuit Court of Appeals’ decision in *Natural Resources Defense Council v. EPA* (“NRDC”).⁶⁰ There the D.C.

⁵⁷ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 749 F.3d 1055, 1062 (D.C. Cir. 2014).

Circuit considered whether the EPA had authority to issue a regulation creating an affirmative defense to a private right of action for violations of emissions standards it issued pursuant to the Clean Air Act, in situations where such violations are caused by “unavoidable” malfunctions.⁶¹ The court held the agency did not have such authority and struck the regulation down for three main reasons.

First, the court noted the statute grants “any person” the right to “commence a civil action” against any person for a “violation of” the EPA standards.⁶² The statute states a federal district court presiding over such a lawsuit has jurisdiction “to enforce such an emission standard” and “to apply any appropriate civil penalties.”⁶³ To determine whether civil penalties are appropriate, the statute directs the courts to “take into consideration (in addition to such other factors as justice may require)” a number of factors, including “the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply,” etc.⁶⁴

Thus, the D.C. Circuit held, although the statute directs the EPA to issue regulations and “creates a private right of action” for their violation, “the Judiciary” “determines ‘the scope’—*including the available remedies*” of “statutes establishing

⁶¹ *NRDC*, 749 F.3d at 1062.

⁶² *Id.* at 1062–63.

⁶³ *Id.* at 1063.

⁶⁴ *Id.*

private rights of action.”⁶⁵ The Clean Air Act was consistent with that principle, the court held, because it “clearly vests authority over private suits in the *courts*, not EPA.”⁶⁶ The court held that, by creating an affirmative defense to the statutory private right of action—as opposed to issuing the regulations to be enforced in those actions as directed by the statute—the EPA impermissibly attempted to dictate to the courts the circumstances under which penalties are “appropriate.”⁶⁷ Therefore, the court struck down the regulation.⁶⁸

Second, the D.C. Circuit noted that the EPA has dual enforcement authority over the Clean Air Act, which authorizes both private actions and agency actions to enforce the regulations.⁶⁹ It also noted the EPA has the power to “compromise, modify, or remit, with or without conditions, any administrative penalty” for a violation in those proceedings.⁷⁰ Under this dual-enforcement structure, the court held, “EPA’s ability to determine whether penalties should be assessed for Clean Air Act violations extends only

⁶⁵ *Id.*, emphasis in original (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

⁶⁶ *Id.*, emphasis added.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

to administrative penalties, not to civil penalties imposed by a court.”⁷¹ The regulation creating an affirmative defense for “unavoidable” violations ran afoul of that principle.⁷²

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.⁷³ Thus, the court held that “[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor” or “as an amicus curiae.”⁷⁴ An intervenor or amicus curiae has no power to create an affirmative defense in the actions in which it intervenes or submits its views, the court held.⁷⁵

The reasoning of *NRDC* directly applies here. First, like the Clean Air Act, the TCPA creates a private right of action for “any person” to sue for violations of the regulations prescribed under the statute and directs the Commission to issue those regulations, but it vests the “appropriate court” with the power to determine whether “a violation” has occurred.⁷⁶ If the court finds a violation, the TCPA imposes automatic minimum statutory damages of \$500, but allows the court “in its discretion” to increase the damages.⁷⁷ The TCPA creates *no role* for the Commission in determining whether a

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* The statute also requires the private plaintiff to give notice to the EPA so the agency can decide whether to intervene. 42 U.S.C. § 7604(c)(3).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ § 227(b)(3).

⁷⁷ *Id.*

violation has occurred, whether it was willful, or whether damages should be increased (and if so, in what amount). Instead, the TCPA “clearly vests authority over private suits in the *courts*,” not the Commission.⁷⁸ Issuing a “waiver” to prevent the Northern District Court of Illinois from determining that “a violation” occurred is no different than the EPA issuing an affirmative defense to prevent courts from determining that civil penalties are “appropriate” because a defendant’s violations were “unavoidable.”

Second, just as the Clean Air Act grants the EPA authority to enforce the regulations through administrative penalties, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations in forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA’s attempt to dictate “whether penalties should be assessed” in private litigation, granting a “waiver” for the purpose of extinguishing SBI’s liability in private litigation would run afoul of the bifurcated dual-enforcement structure Congress has created. The Commission is free to choose not to enforce its regulations against SBI, but it cannot make that choice for Craftwood or the putative class.

Third, the Commission has even *less* authority to grant a waiver than the EPA did to create an affirmative defense because the Clean Air Act at least allows the EPA to intervene in private actions. The TCPA allows the Commission to intervene only in actions brought by state governments to seek civil penalties for violations of the caller-

⁷⁸ *NRDC*, 749 F.3d at 1063, emphasis added.

identification requirements.⁷⁹ It creates no role for the Commission in private TCPA actions. If an agency with express authority to intervene in a private action enforcing its regulations lacks power to create an affirmative defense in that action, then an agency with no authority to intervene cannot grant an outright “waiver” of a defendant’s liability. The Commission is limited to participating in private TCPA actions “as amicus curiae,” as it often does.⁸⁰

In sum, in accordance with *NRDC*, the Commission could not create an affirmative defense of “confusion” or “misplaced confidence” that petitioners could then attempt to establish in court.⁸¹ If the Commission cannot do that, it cannot take the more radical step of simply “waiving” the violation.

II. SBI is not “similarly situated” to the petitioners covered by the Opt-Out Order.

A. SBI does not, and cannot, maintain that it obtained any prior express permission from Craftwood or any other class member.

SBI claims that it should be granted a waiver with respect to faxes sent with prior express permission given before it was even created in June 2009.⁸² It relies on prior express permission given, if at all, to *Senco Products*, a different and unrelated

⁷⁹ § 227(e)(6)(C).

⁸⁰ See, e.g., *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1284 (11th Cir. 2014) (relying on FCC interpretation of TCPA fax rules in amicus letter submitted at court’s request).

⁸¹ As stated *infra*, SBI does not even claim that it was “confused” or had “misplaced confidence.”

⁸² It is therefore completely mystifying that SBI seeks a waiver for faxes sent since August 6, 2006, the effective date of the Commission’s opt-out notice regulations. Petition at 1. SBI did not even exist in August 2006; it was not created until almost three years later.

corporation. Indeed, SBI sought to shield itself from the liabilities of Senco Products, a bankrupt entity, by providing in the bankruptcy court an order stating that SBI was not an affiliate of or successor to Senco Products, and is “not holding itself out to the public as a continuation of the Debtors.” Even assuming *arguendo* that Craftwood—or anyone else—gave Senco Products permission to send fax ads, SBI could not take advantage of any such permission as a matter of law.⁸³

SBI cannot obtain a waiver of § 64.1200(a)(4)(iv) based on prior express permission when it does not, and cannot, maintain that it sent any fax ads based on such permission. This alone precludes SBI from contending that it is “similarly situated” and from obtaining any waiver.⁸⁴

B. SBI fails to give any reason for its failure to provide an opt-out notice on its fax ads.

In the Opt-Out Order, the Commission found that good cause existed to grant waivers to those covered petitioners because of “confusion” or “misplaced confidence” that § 64.1200(a)(4)(iv) did not apply. For example, they all made reference to the

⁸³ See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (defendant cannot take advantage of express consent extended to unaffiliated party).

⁸⁴ It is one thing for the Commission to state in the Opt-Out Order, in the context of petitioners who could claim that they obtained prior express permission, that “[n]or should the granting of such waivers be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue...” Opt-Out Order ¶ 31. But it is an entirely different matter here, where SBI does not and cannot maintain that it obtained any prior express permission.

“confusing footnote language in the record.”⁸⁵ Here, in sharp contrast, SBI makes no attempt to claim that it was similarly situated—it does not offer any reason whatsoever for its failure to provide an opt-out notice on its fax ads.⁸⁶ This separately precludes SBI from obtaining any waiver.⁸⁷

C. SBI’s two reasons why there is supposedly “good cause” for a waiver are directly contradicted by the Commission’s Opt-Out Order.

As established above, SBI makes no attempt to show that it is “similarly situated” to the petitioners covered by the Opt-Out Order. Instead, SBI gives two reasons (and only two reasons) why good cause exists for a waiver. First, it asserts that granting it a

⁸⁵ Opt-Out Order ¶ 24.

⁸⁶ At most, SBI was simply ignorant of the law, which the Commission ruled in the Opt-Out Order is insufficient for a waiver from § 64.1200(a)(4)(iv). See Opt-Out Order ¶ 26. If for any reason the Commission finds SBI was confused or had misplaced confidence, Craftwood has a due process right to investigate the same. It has been denied discovery on this issue to date. See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners’ “due process rights” by denying “serious arguments that merit the Commission’s thoughtful consideration”). The Commission may hold such “proceedings as it may deem necessary” for such purposes and may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purpose of such proceedings.” See 47 C.F.R. § 1.1.

In the alternative, Craftwood requests the Commission order that it will not rule on SBI’s petition until Craftwood has completed discovery regarding SBI’s knowledge (or lack thereof) of the statute and the Commission’s regulations at the time it sent its fax ads.

⁸⁷ Also separately requiring denial of SBI’s petition is the fact that it failed to offer any proof of the amount of its potential liability and did not even claim that the judgment sought by Craftwood would be ruinous to SBI. In face of the failures of SBI’s proof, the Commission cannot determine that SBI’s damages are “substantial” enough to warrant a waiver. See Opt-Out Order ¶ 27.

waiver would be in the “public interest” because no purpose is served by providing an opt-out notice to anyone who “had given permission to [SBI] to send a fax advertisement, and importantly, was capable of contacting [SBI] for purposes of opting out of future fax communications.”⁸⁸ Second, it asserts that the “denial of the waiver would be inequitable and could impose unfair liability on [SBI] based on claims that Congress never intended to create.”⁸⁹ Both reasons are directly contradicted by the Opt-Out Order.

SBI’s first argument runs directly contrary to the Commission’s findings in the Opt-Out Order. The Commission determined that an opt-out notice serves several highly useful purposes to those who have given prior express permission: “The record here confirms that, absent a requirement to include an opt-out notice on fax ads sent with prior express permission, recipients could be confronted with a practical inability to make senders aware that their consent is revoked. At best, this could require such consumers to take, potentially, considerable time and effort to determine how to properly opt out...At worst, it would effectively lock in their consent at a point where they no longer wish to receive such faxes. The opt-out notice requirement ensures that the recipient has the necessary contact information to opt out of future ads and can do in a timely, efficient and cost-free manner, specifically tied to the Commission’s implementation of section

⁸⁸ Petition at 5.

⁸⁹ Petition at 6.

227(b)...Moreover, we find that giving consumers a cost-free, simple way to withdraw previous consent is good policy.”⁹⁰

SBI’s second argument that it would face “unfair liability” for “claims that Congress never intended to create” also fails. The Commission concluded that it validly adopted § 64.1200(a)(4)(iv) pursuant to Congress’s delegation of regulation making authority under section 227(b).⁹¹ Accordingly, the regulation is something that Congress directly intended.

Thus, SBI has shown no good cause for a waiver.

III. It would be contrary to public interest to grant SBI a waiver.

Although unnecessary to deny SBI a waiver because SBI failed to carry its burden to demonstrate “good cause,” it would be against the public interest to grant SBI the waiver it seeks. SBI alleges in the underlying litigation that it had an established business relationship with Craftwood.⁹² In the Opt-Out Order, the Commission reiterated that a “waiver does not extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to such faxes.”⁹³ Accordingly, SBI was required to provide opt-out notices on fax ads sent to Craftwood (and anyone with it claims an

⁹⁰ Opt-Out Order ¶ 20.

⁹¹ See Opt-Out Order ¶¶ 14-20.

⁹² Amended Answer ¶ 11. In actuality, SBI has no established business relationship with Craftwood. See n. 30, *supra*.

⁹³ Opt-Out Order ¶ 2, n. 2; see also ¶ 29.

established business relationship).⁹⁴ It would be against public policy (especially in light of the highly useful purposes served by an opt-out notice as found by the Commission) to give SBI a waiver of liability for its no opt-out notice faxes simply because *some* recipients might have given prior express permission. Because the faxes were sent on the basis of alleged established business relationships with recipients, SBI cannot claim any confusion or misplaced confidence about the need to provide an opt-out notice on the fax in the first place.

Conclusion

The Commission should deny SBI's petition for waiver because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA. Doing so would encroach on the judiciary's power to determine whether "a violation" of a regulation has taken place and Congress's power to impose statutory damages for "each such violation." SBI also is not "similarly situated" to the petitioners covered by the Opt-Out Order because (1) SBI does not, and cannot, maintain that it sent fax ads to Craftwood or any other recipient with prior express permission; (2) SBI gives no reason for its failure to provide opt-out notices on its fax ads; and (3) the two reasons SBI gives as purportedly demonstrating "good cause" are directly refuted by the Commission's Opt-Out Order. In addition, it would be against public policy to waive SBI's liability for violating § 64.1200(a)(4)(iv) given that it was required to provide opt-out notices on fax

⁹⁴ SBI does not seek—nor could it given the Commission's pronouncements—a waiver of the requirement that it provide an opt-out notice on fax ads sent based on an established business relationship.

ads anyway because they were sent to recipients with whom SBI claims an established business relationship.

Dated January 13, 2015.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Orange, State of California. My business address is 4 Park Plaza, Suite 1100, Irvine, CA 92614.

On January 13, 2015, I served true copies of the following document(s) described as:

**Craftwood Lumber Company's Comments on Petition for Waiver of the Commission's Rule
on Opt-Out Notices on Fax Advertisements Filed by
Senco Brands, Inc.**

on the interested parties in this action as follows:

SEE THE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Payne & Fears LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 13, 2015, at Irvine, California.



Jennifer Hoke

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